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No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

STEVEN MONTES,
Petitioner,

v.

PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

On Petition For Writ Of Certiorari To The Supreme Court of California

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PETITION FOR WRIT OF CERTIORARI

RICHARD G. NOVAK
Counsel of Record
LAW OFFICES OF RICHARD G. NOVAK
959 EAST COLORADO BLVD., SUITE 1B
PASADENA, CA 91106
626-396-9206

QUESTIONS PRESENTED

States may adopt wiretap statutes so long as they comply with federal statutory and constitutional limits on electronic surveillance. 18 U.S.C. § 2516(2).

I.

Does application of California's "informant privilege" (Cal. Evid. Code § 1041) to affidavits filed in support of wiretap applications and pre-wiretap investigative materials violate a criminal defendant's right under the federal wiretap statute to challenge the "necessity" for electronic surveillance (18 U.S.C. §§ 2515, 2518(3) (c))?

II.

Does application of California's "informant privilege" (Cal. Evid. Code § 1041) to affidavits filed in support of wiretap applications and pre-wiretap investigative materials comport with the constitutional principle of fundamental fairness that was at issue in Roviaro v. United States, 353 U.S. 53, 77 S.Ct. 623, 1 L.Ed.2d 639 (1957)?

III.

Does extension to wiretap affidavits of the *in camera* review procedure approved for search warrant affidavits by the California Supreme Court in People v. Hobbs, 7 Cal.4th 948, 30 Cal.Rptr.2d 651 (1994), exceed limits placed by this Court on the scope of the informant privilege?

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In The

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STEVEN MONTES,
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v.

PEOPLE OF THE
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PETITION FOR WRIT OF CERTIORARI

Petitioner Steven Montes respectfully petitions this Court for a writ of certiorari to review the order of the Superior Court of the State of California for the County of Los Angeles denying petitioner's motion for discovery.

OPINIONS AND ORDERS BELOW

The Superior Court of California for the County of Los Angeles denied petitioner's motion for discovery on November 16, 2006. The Court of Appeal of the State of California summarily denied petitioner's petition for writ of mandate on February 7, 2007. On April 18, 2007, the Supreme Court of California summarily denied petitioner's petition for review of the Court of Appeal's order.

JURISDICTION

This Court has jurisdiction to review the judgment of the California Supreme Court under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED[1]

I. U.S. Const. Amend. IV

II. U.S. Const. Amend. V

III. U.S. Const. Art. VI, cl.2

IV. Fed. R. Evid. 501

V. 18 U.S.C. §§ 2515, 2516(2), 2518(3)

VI. Cal. Evid. Code §§ 1040-1042

VII. Cal. Penal Code §§ 629.50, 629.62, 629.72

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[1] Pursuant to this Court's Rule 14.1. (f), the constitutional provisions and statutes involved in this case are set out in the Appendix ("App.") at 15-29.

STATEMENT OF THE CASE

I.

Procedural History

On May 2, 2006, the People of the State of California filed a Felony Complaint against petitioner Steven Montes ("Mr. Montes") and eight other defendants. The complaint alleges criminal conspiracies in violation of California Penal Code section 182 and violation of various provisions of the California Health and Safety Code. (App. at 39-59) The criminal investigation was led by the Bureau of Narcotic Enforcement ("BNE") of the California Department of Justice. (App. at 60-74)

The BNE investigation utilized 7 court-authorized interceptions of electronic communications ("wiretaps") on 14 cellular telephones during the period November 2005 through March 2006. (App. at 120-26)

At the outset of the litigation, the People initially refused to provide Mr. Montes with any discovery documenting the nature and scope of the BNE investigation prior to the implementation of the wiretap. (App. at 120-26) Subsequently, the People provided Mr. Montes with eight (8) BNE Reports of Investigation (the "pre-wiretap reports"). (App. at 127-59) However, the People's redactions to the pre-wiretap reports concealed the entire investigation.

(App. at 127-59) While the People provided Mr. Montes with the affidavits filed in support of the wiretap applications, the affidavits were also substantially redacted. (App. at 75-119)

In defense of these redactions, the People invoked the privileges set forth at California Evidence Code sections 1040 through 1042 and the California Supreme Court decision in People v. Hobbs, 7 Cal.4th 948, 30 Cal. Rptr. 2d 651 (1994) to justify the redactions and withholding of information concerning the nature of the BNE investigation prior to the first wiretap application. (App. at 120-126)

On September 1, 2006, Mr. Montes moved to compel the People to produce unredacted affidavits filed in support of applications for orders authorizing the interception of wire communications ("wiretap applications") and unredacted reports of investigative activities undertaken prior to the filing of wiretap applications (the "motion to compel").

In the motion to compel, Mr. Montes argued that the People's redactions to these wiretap-related materials violated his rights under both the Fourth Amendment the United States Constitution and his rights under the Due Process Clause of the Fifth Amendment. (App. at 32-33). Mr. Montes also argued that redaction of these materials violated his right to litigate the "necessity" for the wiretap under California Penal Code sections 629.52(d) and 629.72,

and sections 2518(3)(c) of Title 18 of the United States Code. (App. at 3-14) On November 16, 2006, the Superior Court denied Mr. Montes' motion for discovery. (App. at 3-14)[2]

II.

Reasons Why the Petition Should Be Granted

This Court should grant review because the decision of the Supreme Court of California to leave undisturbed the trial court's order denying the motion to compel relates to an important question of federal law that has not been, but should be, settled by this Court. (Rule 10(c)).

Specifically, this Court has never addressed the extent to which the common law "informant privilege" recognized in Scher v. United States, 305 U.S. 251, 59 S.Ct. 174, 83 L.Ed. 151 (1938), Roviaro v. United States, 353 U.S. 53, 77 S.Ct. 623, 1 L.Ed.2d 739 (1957) and McCray v. Illinois, 386 U.S. 300, 87 S.Ct 1056, 18 L.Ed.2d 62 (1967) properly limits a criminal

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[2] Mr. Montes subsequently filed a petition for writ of mandate in the Court of Appeal of the State of California. The petition was denied on February 7, 2007. (App. at 2). Mr. Montes then filed a petition for review in Supreme Court of California. The California Supreme Court denied the petition for review on April 18, 2007. (App. at 1). The argument that the Superior Court's order offended Mr. Montes' rights under the federal wiretap statute and the United States Constitution was reiterated in each petition. (App. at 33-38)

defendant's right to litigate the "necessity" for a wiretap issued under either federal or state law. Nor has this Court ever addressed the extent to which invocation by a State of its own informant privilege offends principles of fundamental fairness.

The decision of the Superior Court denying Mr. Montes' motion to compel disclosure of the scope of the BNE's investigation prior to the first wiretap places these federal statutory and constitutional questions squarely at issue.

ARGUMENT

I.

The People's Evidence was Obtained Through Wiretaps Authorized by State Law

The investigation led by Special Agent Salaiz ("SA Salaiz") utilized 7 court-authorized wiretaps covering 14 cellular telephones. The first wiretap was authorized on November 3, 2005. Subsequent wiretaps were authorized on November 21, 2005, December 12, 2005, December 15, 2005, January 13, 2006, February 17, 2006 and March 14, 2006. (App. at 120-126).

In the 14-page Statement of Probable Cause filed in support of the arrest warrants issued in this case, BNE Special Agent Wilde ("SA Wilde") summarizes the investigation. Importantly, SA Wilde's probable cause statement does not rely upon

any investigation, evidence or information developed prior implementation of the first wiretap on November 3, 2005. (App. at 60-74).

On November 4, 2005, one day after the first wiretap was implemented, law enforcement seized $600,049 from a vehicle driven by defendant Joel Nunez. According to the People's list of "Overt Acts" in support of the conspiracy and SA Wilde's affidavit, this seizure was the direct result of information obtained from a wiretap intercept of conversations between Mr. Montes and Joel Nunez. (App. at 50-52, 61-63). This seizure corresponds to the offense charged in Count 3. (App. at 41-42).

On November 28, 2005, one week after the second wiretap was authorized, law enforcement seized $195,670 from a vehicle driven by defendant Antonio Anguiano. This seizure was a direct result of information obtained during the wiretap interception of conversations between Mr. Montes and Mr. Anguiano, and is charged in Count 4. (App. at 42, 50-52, 63-67).

On January 20, 2006, one week after the fourth wiretap was extended, law enforcement executed a search warrant at a residence located in Sylmar. The information developed in support of the search warrant was obtained from the court-authorized wiretaps. (App. at 66-70). During the search of that residence, law enforcement seized approximately 650

pounds of marijuana, as alleged in counts 5 and 6. (App. at 43).

On February 25, 2006, law enforcement seized 175 kilograms of cocaine from a tractor trailer truck driven by defendant Samuel Viveros Murillo. All of the information obtained by law enforcement that led to this seizure was developed through wiretap intercepts of telephone conversations between Mr. Montes and others. (App. at 52-57, 69-72). Counts 7, 8 and 14 in the Felony Complaint correspond to this seizure. (App. at 44-45, 48).

On February 26 and March 1, 2006, in the State of Illinois, agents seized 178 kilograms of cocaine from vehicles that had allegedly been driven by defendants Augustine Alvarez and Omar Cruz. These seizures were the direct result of wiretap surveillance of conversations between Mr. Montes and others. (App. at 56-59). These seizures are alleged in Counts 9 through 12. A simultaneous search of a residence in Illinois led to the discovery of $100,000. (Count 13) (App. at 45-48).

II.

The Federal Wiretap Statute Controls Wiretap Laws Adopted by the States

Section 2516(2) of Title 18 of the United States Code regulates electronic surveillance by state officers.

A judge may approve a wiretap "in conformity

with...this chapter and with the applicable State statute." 18 U.S.C. § 2516(2) In other words, state wiretap statutes are valid "only if the provisions of those laws are at least as restrictive as the federal requirements for a wiretap set out in Title III of the Omnibus Crime Control and Safe Streets Act of 1948 ("Title III")". People v. Jackson, 129 Cal. App. 4th 129, 146, 28 Cal. Rptr.3d (2005).

This Court has stated that the government may resort to electronic surveillance, when necessary, only when assurances have been made that citizens are not subject to unreasonable and unnecessary intrusions into their privacy. United States v. Giordano, 416 U.S. 505, 526-27, 94 S. Ct. 1820, 40 L. Ed. 2d 341 (1974). In making the initial determination to authorize a wiretap, the court must balance the interest of law enforcement and the restraint necessary to protect the public in the context of wiretap interception. United States v. Kalustian, 529 F.2d 585, 588 (9th Cir. 1976).[3]

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[3] 18 U.S.C. § 2518, subdivision (1) provides:
(1) Each application for an order authorizing or approving the interception of a wire, oral, or electronic communication under this chapter shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state applicant's authority to make such application. Each application shall include the following information:

(a) the identity of the investigative or law enforcement officer making the application, and the officer authorizing the application;

(b) a full and complete statement of the facts and circumstances relied upon by the applicant, to justify his belief that an order should be issued, including (i) details as to the particular offense that has been, is being, or is about to be omitted, (ii) except as provided in subsection (11), a particular description of the nature and location of the facilities from which or the place where the communications is to be intercepted, (iii) a particular description of the type of communications sought to be intercepted, (iv) the identity of the person, if known, committing the offense and whose communications are to be intercepted, (iv) the identity of the person, if known, committing the offense and whose communications are to be intercepted;

(c) a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous;

(d) a statement of the period of time for which the interception is required to be maintained. If the nature of the investigation is such that the authorization for interception should not automatically terminate when the described type of communication has been first obtained, a particular description of facts establishing probably cause to believe that additional communications of the same type will occur thereafter;

(e) a full and complete statement of the facts concerning all previous applications known to the individual authorizing and making the application, made to any judge for authorization to intercept, or for approval of interceptions of, wire, oral, or electronic communications involving any of the same persons, facilities or places specified in the application, and the action taken by the judge on each such application; and

(f) where the application is for the extension of an order, a statement setting forth the results

The Act's requirement that a wiretap is only to be authorized when it is necessary to accomplish the legitimate goals of a criminal investigation is squarely at issue in this case because the People's redactions to both the affidavits filed in support of the wiretap applications and Reports of Investigation that document the pre-wiretap investigation effectively preclude Mr. Montes from understanding and challenging the government's decision to seek a wiretap and the court's approval.

The government bears the burden of establishing that it has satisfied the "necessity" requirement set out at 18 U.S.C. § 2518(3)(c). (App. at 18) "This necessity requirement means that the affidavit must set forth a factual background that shows that ordinary investigative procedures, employed in good faith, would likely be ineffective in the particular case." United States v. Brone, 792 F.2d 1504, 1506 (9th Cir. 1986).

While electronic surveillance need not be used only as a last resort, wiretaps are not to be "routinely employed as the initial step in a criminal investigation." United States v. Giordano, 416 U.S. 505, 515, 94 S.Ct. 1820, 40 L. Ed. 2d 341 (1974); United States v. Bailey, 607 F.2d 237, 241 (9th Cir.

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thus far obtained from the interception, or a reasonable explanation of the failure to obtain such results.

1979) cert. den., 445 U.S. 934 (1980). The "necessity requirement" exists to limit the use of wiretaps because of their highly intrusive nature and to assure that wiretapping is not resorted to in situations where "traditional investigative techniques would suffice to expose the crime." United States v. Kahn, 415 U.S. 143, 153 n.12, 94 S.Ct. 977, 3 L. Ed. 2d 225 (1974). If the application does not contain an adequate "statement" concerning the use of other investigative procedures, a warrant based upon such an application is invalid. United States v. Donovan 429 U.S. 413, 435, 97 S.Ct. 658, 50 L. Ed. 2d 652 (1977).

As stated by the Ninth Circuit in United States v. Carneiro, 861 F.2d 1171, 1176 (9th Cir. 1989):

> A district court must reject a wiretap application if law enforcement officers have not first attempted, without success, traditional investigative methods that 'easily suggest themselves and are potentially productive and not unduly dangerous.' ... The purpose of the necessity requirement is to ensure that wiretapping is not resorted to in situations where traditional investigative techniques would suffice to expose the crime.

The Government must overcome the statutory presumption against granting a wiretap application. United States v. Ippolito, 774 F.2d 1482, 1486 (9th Cir. 1985). Absent specific circumstances that render

normal investigative techniques particularly ineffective, the application must be denied. Id. at 1486. Allegations that the crime being investigated is inherently difficult to solve will not suffice. United States v. Martinez, 588 F.2d 1227, 1231 (9th Cir. 1978). "Bald conclusory statements without factual support are not enough." United States v. Commito, 918 F.2d 95, 97 (9th Cir. 1990); United States v. Abascal, 564 F.2d 821, 826 (9th Cir. 1977), cert. den. sub. nom., 435 U.S. 942 (1978). Although the necessity requirement "is tested in a practical and common-sense fashion," to determine the reasonableness of a specific alternative technique, a "particularized showing" is necessary. United States v. Echavarria-Olarte, 904 F.2d 1391, 1396 (9th Cir. 1990). The reason for requiring specificity is to prevent the Government from making general allegations about classes of cases and thereby sidestepping the necessity requirement in the particular investigation for which the wiretap is sought. As the Ninth Circuit observed in Ippolito:

> [W]e must be careful not to permit the Government merely to characterize a case as a 'drug conspiracy' . . . that is therefore inherently difficult to investigate. The affidavit must show with specificity why in this particular investigation ordinary means of investigation will fail.

United States v. Ippolito, 774 F.2d at 1486 (original emphasis) (quoting United States v. Robinson, 698 F.2d 448, 453, (D.C. Cir. 1983).)

In United States v. Kalustian, the Ninth Circuit held that mere conclusory statements that traditional procedures have failed in the past and are likely to fail in the future were insufficient compliance with the statutory requirement, requiring suppression of the evidence. The Kalustian panel stated:

> Obviously, electronic surveillance can facilitate criminal investigation. ...But Title III does not allow wiretapping to replace such other techniques unless they 'have been tried and failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous' ...The Government failed in this case to satisfy 18 U.S.C. §2518(a) (c). Its application did not adequately show why traditional investigative techniques were not sufficient in this particular case. A judge reviewing a wiretap application is handicapped without such a showing. Title III and the individual's right to privacy, which it seeks to preserve, demand no less than a full and complete

statement of underlying

circumstances.

The Kalustian panel concluded that the affidavit did not enlighten the magistrate as to why the conspiracy in that particular case presented any investigative problems which were distinguishable in nature or degree from any other conspiracy. United States v. Kalustian, 529 F.2d 585, 589-90 (9th Cir. 1975).

III.

The Informant Privilege Under this Court's Precedents

This Court has long recognized an "informant privilege" allowing the government to withhold information regarding the identity of an informant in certain circumstances. Scher v. United States, 305 U.S. 251, 254, 59 S.Ct. 174, 83 L.Ed. 151 (1938) ("public policy forbids disclosure of an informer's identity..."). The government is generally privileged to withhold the identity of an informant defendant, unless nondisclosure violates a defendant's right to "fundamental fairness."

The leading Supreme Court case of Roviaro v. United States, 353 U.S. 53, S.Ct. 623 (1957), provided that the "informer's privilege" is in reality the government's privilege to withhold the identity of the informant. Id. at 59. The policy behind the privilege

recognizes the obligation of citizens to inform law enforcement about their knowledge of criminal conduct, and by remaining anonymous, encourage them to perform such obligation. Nevertheless, the informant privilege is not without limitations. "Where disclosure of an informer's identity, or of the contents of his communication, is relevant and helpful to the defense of an accused, or essential to a fair determination of a cause, the privilege must give way." Id. at 60-61.

In Roviaro, the government refused to disclose the identity of the informant on the grounds that it was privileged information. This Court found that under the circumstances, the privilege was not applicable because the disclosure of the informant's identity was material to the defense because the informant had been present when the defendant allegedly committed the crimes charged against him. Id. at 63.

This Court did not establish a fixed rule with respect to when the informant privilege is properly invoked. Instead, the Court stated that the issue is one that is to be determined by balancing in each instance the public interest in protecting the free flow of information against a defendant's right to prepare his case. Id. at 62. This Court's decision to require disclosure of the informant's identity in Roviaro was based on "fundamental requirements of fairness." Id. at 60.

This Court has consistently connoted "fundamental fairness" with a constitutional right to due process. "As applied to a criminal trial, denial of due process is the failure to observe that fundamental fairness essential to the very concept of justice." Lisenba v. California, 314 U.S. 219, 236, 62 S.Ct. 280, 290, 86 L.Ed. 166 (1941). As Justice Rehnquist noted, "[One] of the purposes of the Due Process Clause of the Fourteenth Amendment is to insure...'essential demands of fairness.'" Ham v. South Carolina, 409 U.S. 524, 93 S. Ct. 848, 35 L.Ed. 2d 46, 50 (1973). "A fair trial in a fair tribunal is a basic requirement of due process." In re Murchison, 349 U.S. 133. 136. 75 S. Ct. 623, 625, 99 L.Ed. 942 (1955).

This Court's decision in McCray v. Illinois, 386 U.S. 300, 87 S. Ct. 1056, 18 L. Ed. 2d 62 (1967), addressed whether the identity of a confidential informant must be disclosed to a defendant who seeks to challenge the finding of probable that permitted an arrest and search. The State asserted the informant privilege. Id. at 308. This Court concluded that the failure to identify the informant at a preliminary hearing to determine probable cause for arrest did not violate the defendant's rights under the confrontation clause. Id. at 313.

This Court has never addressed the extent to which a federal or state court may limit a defendant's

access to information that established the necessity for a wiretap by relying on an informant privilege.

IV.

California's Comprehensive Wiretap Statute

A. Introduction

California has a comprehensive statutory scheme regulating interception by law enforcement of wire, electronic pager or electronic cellular telephone communications. Cal. Penal Code §§ 629.50 et seq.

Careful analysis of the overall framework of the wiretap statutes demonstrates that surreptitious surveillance of private communications bears no resemblance to run-of-the-mill search warrants. In Berger v. New York, this Court noted the particularly invasive character of wiretapping.

> The need for particularity and evidence of reliability in the showing required when judicial authorization of a search is sought is especially great in the case of eavesdropping. By its very nature eavesdropping involves an intrusion on privacy that is broad in scope. [T]he indiscriminate use of such devices in law enforcement raises grave constitutional questions under the Fourth and Fifth Amendments, and imposes 'heavier responsibility on this

Court in its supervision of the fairness of procedures.

Berger v. New York, 388 U.S. 41, 56, 87 S. Ct. 1873, 18 L. Ed. 2d 1040 (1967) (internal citations omitted).

Applications for an order authorizing wiretaps may only be made upon the personal oath of the Attorney General or District Attorney, their chief deputies or persons designated to act in their absence. Applications must be reviewed by the presiding judge of the superior court or other judges specifically designated. Cal. Penal Code § 629.50(a). Search warrant applications are not subject to such restrictions on who may seek them and who may approve them.[4]

B. Wiretaps May be Used Only to Investigate Certain Categories of Crime

The wiretap statute only permits interception where the criminal activity under investigation is one of the statutorily enumerated narcotics offenses involving more than an established minimum quantity of substances, murder, solicitation to murder or felonies involving destructive devices, participation in a criminal street gang, or weapons of mass

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[4] In People v. Jackson, the California Supreme Court held that the "good faith" exception to the warrant requirement established by this Court in United States v. Leon, 468 U.S. 897, 82 L.Ed.2d 677, 104 S.Ct. 3405 (1984), is not applicable to defective wiretap orders.

destruction, including attempts or conspiracies to commit any of the above-listed offenses. Cal. Penal Code § 629.52(a) ("section 629.52(a)"). There is no limitation in California law on the criminal activity that may be investigated through execution of a traditional search warrant.

C. Four Separate Findings are Required Before an Order May Issued

Upon application, a court may issue an order authorizing interception only after making all of the following findings:

1) that there is probable cause to believe that an individual is engaged in one of the specified criminal activities listed in section 629.52(a);

2) that there is probable cause to believe that particular communications concerning the specified illegal activities will be obtained through the interception;

3) that there is probable cause to believe that electronic devices to be intercepted are being used or are about to be used "in connection with the commission of the offense" or are leased to, listed in the name of or "commonly used" by the person whose communications are to be intercepted, and

4) that normal investigative procedures have been tried and have failed or reasonably appear either to be unlikely to succeed if tried or to be too dangerous. Cal. Penal Code § 629.52(b)-(d) (emphasis

added). This fourth requirement is commonly referred to as the "necessity" requirement. People v. Zepeda, 87 Cal. App. 4th 1183, 1195, 105 Cal. Rptr.2d 187, 194 (2001).

Because the court may only issue an order authorizing interception where all four of these requirements are met, the content of applications must also comply with stringent statutory requirements.

D. No Defendant May be Tried or Convicted without First Receiving Notice of the Existence of Evidence Obtained from a Wiretap

A defendant in a criminal proceeding has an absolute right to notice that he or she was "identified as the result of an interception." This notice must be provided prior to entry of a plea of guilty or nolo contendere and at least 10 days prior to any trial or hearing other than arraignment. Cal. Penal Code § 629.70(a). This right to notice also provides that "the prosecution shall provide to the defendant a copy of all recorded interceptions from which evidence against the defendant was derived, including a copy of the court order, accompanying applications, and monitoring logs. Cal. Penal Code § 620.70(b) (emphasis added). "A court may issue an order limiting disclosures pursuant to subdivisions (a) and

(b) upon a showing of good cause." Cal. Penal Code § 629.70(d).

Evidence obtained from a wiretap may not be used at trial unless the recorded interception, a transcript, the order, the accompanying applications and monitoring logs have been provided to the defendant not less than 10 days prior to trial. If the transcript cannot be provided 10 days prior to trial, evidence from a wiretap may not be admitted at trial unless the court finds that the defendant will not be prejudiced by the delay in receiving the transcript. There is no exception to the 10-day rule with respect to the recording itself, the application, order or monitoring logs. Cal. Penal Code § 629.70(c).

E. The Wiretap Statute Provides a Defendant with an Explicit Right to Move to Suppress the Contents of Intercepted Communications or Evidence Derived from an Interception

California Penal Code section 629.72 provides that [a]ny person in any trial, hearing, or proceeding, may move to suppress some or all of the contents of any intercepted wire, electronic pager, or electronic cellular telephone communications, or evidence derived there from, only on the basis that the contents or evidence were obtained in violation of the Fourth Amendment of the United States Constitution or of this chapter. Cal. Penal Code § 629.72.

F. The Necessity Requirement

The necessity requirement is central to the validity of a wiretap. While technical defects in a wiretap application or order or in the implementation of the intercept do not rise to the level of a Fourth Amendment violation, the failure to establish the "necessity" prong of the 4 prerequisites to issuance of a wiretap is a well-established ground upon which evidence may be suppressed and upon which a wiretap can be attacked under section 629.72.

California's Sixth Appellate District's opinion in People v. Zepeda, issued in 2001, concluded that at that time "no published California case has yet to address the "necessity" requirement of section 629.52, subdivision (d)" and looked, therefore, to federal cases for direction. People v. Zepeda, 87 Cal. App. 4th 1183, 1204, 105 Cal. Rptr.2d 187, 199 (2001). In Zepeda, the Court dissected the "necessity" requirement set out at section 629.52(d) into three separate parts, any one of which may establish the need for a wiretap:

The Government may establish the need for a wiretap by showing *either* (i) that normal investigative procedures have been tried and failed, *or* (ii) that normal investigative procedures, though not yet tried, 'reasonably appear' to be either 'unlikely to succeed if tried' or 'too dangerous' In reality, this gives the government three alternative ways to establish the need for a wiretap.

People v. Zepeda, 87 Cal. App. 4th at 1204.

In sum, an affidavit must show (1) why in this particular investigation (2) normal investigative techniques (3) employing normal resources (4) in good faith (5) have failed to make the case (6) in a reasonable period of time. Since necessity is a keystone of Congressional regulation of electronic eavesdropping, courts closely examine challenges for noncompliance and reject applications that misstate or overstate the difficulties involved. See C. Fishman, Wiretapping and Eavesdropping, §89 (1978).

V.

The "Official Information" and "Confidential Informant" Privileges in California Evidence Code Sections 104-1042

A. Introduction

In this matter, the State and the Court invoked the "official information" and "confidential informant" privileges in California Evidence Code sections 1040 and -1041 ("sections 1040 and 1041") to justify withholding from Mr. Montes all information concerning the nature and scope of the investigation of the investigation of Mr. Montes prior to the implementation of the court-authorized wiretaps. (App. at 3-19) According to the State, BNE SA Salaiz prepared only 7 investigative reports prior to the

implementation of the wiretap and there are no other reports related to the investigation. (App. at 123-126).

The entire content of five of those investigative reports has been redacted by the People. (App. at 127-148). The redactions are so extensive that with the exception of the date on which the report was prepared and the name of the author of the report, absolutely no information about the nature of the investigation can be gleaned from them.

After the Superior Court received *in camera* testimony on two occasions and reviewed the People's redactions *in camera,* the Superior Court determined that none of the redactions of investigative reports one through five exceeded the scope authorized by sections 1040-1041 and ruled that the privileges at sections 1040-1041 apply to information sought by a defendant who seeks to challenge the necessity of a court-authorized wiretap. (App. at 13).

B. California Evidence Code Section 1040

California Evidence Code section 1040 ("section 1040") establishes a qualified privilege for "official information", which is defined as " information acquired in confidence by a public employee in the course of his or her duty and not open, or officially disclosed, to the public prior to the time the claim of privilege is made." Cal. Evid. Code § 1040(a). (App. at 19-20)

C. California Evidence Code Section 1041

California Evidence Code Section 1041 ("section 1041") also provides for a qualified privilege for the identity of an "informer". (App. at 1041)

While the qualified privilege established in section 1041 refers specifically to the identity of an informer, the Supreme Court of California has stated that there is a "well-established corollary rule that if disclosure of the contents of [the informant's] statement would tend to disclose the identity of the informer, the communication itself should come within the privilege." People v. Hobbs, 7 Cal. 4th 948, 962, 873 P.2d 1246, 30 Cal. Rptr.2d 651 (1994).

The balancing tests set forth in sections 1040 and 1041 are identical: in order to withhold confidential information from a defendant, the "necessity" for preserving confidentiality must outweigh the interests of justice.

VI.

The California Supreme Court Decision in People v. Hobbs is Limited to Search Warrant Challenges

In People v. Hobbs, 7 Cal. 4th 948, 962, 873 P.2d 1246, 30 Cal. Rptr.2d 651 (1994), the issue was whether a defendant challenging a search warrant is entitled to the disclosure of an informant's identity or information regarding the informant's

communications. Id. at 954. The California Supreme Court held that pursuant to the government's privilege to protect the identities of confidential informants, information that might form the basis for challenging the validity of a search warrant affidavit, which if disclosed, would reveal the identity of the informant, may be redacted. Id. at 971-72. Also, portions of a search warrant affidavit relating facts or information which, if disclosed, will reveal a confidential informant's identity may be sealed. Id. at 973. The materials are made available for *in camera* review by the trial court in connection with a motion to challenge the warrant's validity or discover whether the informant is a material witness to the defendant's guilt or innocence. Id. at 974.

The ruling in Hobbs established a rule to be followed in search warrants challenges but did not address challenges to wiretaps and no subsequent California Supreme Court decision or federal court decision has addressed that question. While the Superior Court's decision in this case was based upon the rule established in Hobbs, no court has ever applied the rationale of Hobbs to a court-authorized wiretap.

VII.

The Superior Court's Application of a Qualified Privilege to Wiretap Materials Precludes Mr. Montes From Meaningfully Challenging the Necessity of the Wiretap

This Court has never addressed the scope of 18 U.S.C. § 2516(2). Nor has this Court addressed whether the application of a qualified privilege to information in pre-wiretap investigative reports and wiretap affidavits violates the federal wiretap statute or due process.

Wiretaps are generally disfavored, implicate important Constitutional rights, and are controlled by a strict statutory framework. Without access to the materials denied Mr. Montes, he is unable to meaningfully challenge the necessity for and propriety of the wiretaps utilized in this investigation.

Mr. Montes has both a federal a statutory right and a constitutional due process right to litigate the necessity of the wiretap, and "necessity" is central to validity of the wiretap.

In the present case, the California Superior Court denied Mr. Montes' motion to compel disclosure of investigative reports and affidavits. The California Superior Court determined that Mr. Montes' right to challenge the necessity for the court-authorized wiretaps is limited by California's informant privileges.

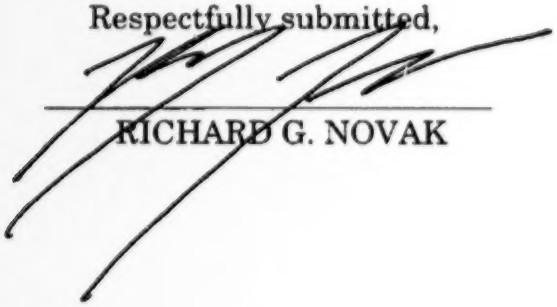
Under federal law, there is a presumption against the use of wiretaps. In this case, application of the informant privilege offends both the wiretap statute and fundamental fairness because it deprives Mr. Montes of any meaningful right to exercise his rights under the wiretap statues.

CONCLUSION

Mr. Montes respectfully requests that this Court grant his petition for certiorari.

DATED: July 16, 2007

Respectfully submitted,



RICHARD G. NOVAK